Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-655

LONNIE CREEL, JR., et al., etc.,

Petitioners,

vs.

FRANK E. FREEMAN, et al., etc.,

Respondents.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

LONNIE CREEL, JR., JACK SULLIVAN, CLINT FOREMAN, TOM W. GAINES, DAN WHITAKER, and JAMES M. ELLISON, individually and for all others similarly situated,

Petitioners,

vs

FRANK E. FREEMAN, E.K. BARNES, CLARENCE HENDRIX, EUGENE MCDANIEL and DORIS ROBERTS, individually, as members of the Walker County Board of Education, and on behalf of all other school boards and school board members similarly situated; ROBERT E. CUNNINGHAM, individually and as Superintendent of Education of Walker County, and on behalf of all other Superintendents similarly situated; PROBATE JUDGE FLORA L. STEWART, SHERIFF HOWARD TURNER, and CIRCUIT CLERK SYLVESTER ANTON in their official capacities as members of the board of supervisors of elections and on behalf of all other boards of supervisors similarly situated,

Respondents.

---

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-styled case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 531 F.2d 286 and is appended hereto at 1a. The denial of the petition for rehearing and suggestion for rehearing en banc is noted at 537 F.2d 1143 and is appended hereto at 10a. The opinions and orders of the United States District Court for the Northern District of Alabama granting summary judgment are unreported and appended hereto at 11a-12a.

## JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on May 10, 1976. A timely petition for rehearing and suggestion for rehearing en banc was denied on August 12, 1976. This Court has jurisdiction to review the judgment below under 28 U.S.C. §1254(1).



## QUESTIONS PRESENTED

1. Whether a statute which allows residents of one school district to vote in the elections of another school district dilutes the vote of residents of the second district in violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States?

2. Whether the residents of one school district are provided a sufficient interest in the affairs of another school district justifying their right to vote in the second district (when no reciprocal right to vote exists) because the districts share certain facilities, revenues, and draw students from each others' jurisdiction?

3. Whether a claim based on dilution of the franchise because of overinclusiveness of the franchise must fail if there is a finding that the challenged electorate does not have the voting strength by itself to dominate the elections?

4. Whether plaintiff electors claiming dilution of the franchise because of overinclusiveness of the franchise have the burden of demonstrating a compelling state interest in limiting the franchise?

5. Whether domination of elections by electors challenged on the basis of overinclusiveness of the franchise may be justified by a rational relationship test unless there is evidence of invidious discrimination?

6. Whether summary judgment is properly affirmed under facts not found by the district court and which are not undisputed in the record?

## CONSTITUTIONAL AND STATUTORY PROVISIONS RELIED UPON

The constitutional provisions and other provisions of law involved in this case are set forth in full in the Appendix, 13a, et seq., as follows:

United States Constitution, Amendment I

United States Constitution, Amendment XIV, §1

United States Code, Title 42, §1983

Ala. Code, Title 52, §63 (1958 Recomp.)

Acts of Alabama, 1965 Regular Session, Act No. 138.



## STATEMENT OF THE CASE

This action was filed on January 28, 1974, by the present petitioners, as representatives of a class of plaintiffs who live within the jurisdiction of the Walker County, Alabama, Board of Education. The complaint alleged that the practice of allowing residents of cities with school boards to vote in county school board elections was unconstitutional in that it allowed persons with no substantial interest in the county school board to vote in its elections. The defendants in the suit were the Superintendent of Education, the members of the Board of Education, and the members of the Board of Election Supervisors of Walker County, Alabama. Each defendant was sued as a representative of the class of officials in 36 other counties. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. § 1983 and the first and fourteenth amendments of the United States Constitution.

The court eventually disallowed the class action as to the other counties and the case proceeded as a class action concerning only Walker County.[1]

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1. That aspect of the district court's ruling was not appealed nor was its ruling that a three-judge court was not necessary.

After discovery the district court granted the summary judgment in favor of defendants, and the court of appeals affirmed.

The evidence, all documentary in form, may be summarized in pertinent part as follows:

Methods of Election: Alabama law provides for each county one board of education with five members to be "elected by the qualified electors of the county." Ala. Code, Tit. 52, §63, infra, 14a. A local act applying only to Walker County provides that the chairperson shall be elected at large and the four members from individual districts, infra, 15a.

City school boards are permitted by law for each city of over 5,000 inhabitants, Ala. Code, Tit. 52, §148. The cities of Carbon Hill and Jasper, located in Walker County, have independent school boards appointed by the city governing body, Ala. Code, Tit. 52, §152. No person is excluded from voting in the Walker County school board elections because of his or her residence in Jasper or Carbon Hill. Each city school board is essentially equal in its power, authority, and duties to a county school board. When a city school board is created, its territorial jurisdiction is subtracted from the jurisdiction of the county school board. School boards -- both city and county -- are equal and exclusive.



None of the incumbent county school board members lives in Jasper or Carbon Hill.

Financial Structure: The school systems are supported by ad valorem and sales taxes. One ad valorem tax is collected from the whole county for the state's general fund, from which it returns on a basis of need to the school boards in Alabama. A second ad valorem tax collected in the whole county is divided between the three systems on the basis of average daily attendance in accordance with a state formula. A third ad valorem tax is collected in each of the school tax districts and expended only in the district of collection. Additionally, the two cities each have a sales tax paid to their own school boards.

School Locations: The Walker County School System operates one school not within its territorial jurisdiction -- the Walker Area Vocational Center located in Jasper. This institution was constructed with city, county, and federal funds. It is operated by the Walker County Board with its own funds, and an additional $50.00 per student paid by the Jasper School Board for each city resident attending the Center. No other school operated by one school board is located in the jurisdiction of another school board.

Student Attendance: About half of the students attending Carbon Hill schools and the high school in Jasper are residents of the county school board jurisdiction. The number of city residents attending county schools if any there be is not reflected in the record.

## REASONS THE WRIT SHOULD BE GRANTED

### 1. The Decision Below is in Conflict With a Decision of the United States Court of Appeals for the Fourth Circuit.

The decision below cited and distinguished the decision of the United States Court of Appeals for the Fourth Circuit in Locklear v. North Carolina State Board of Elections, 514 F.2d 1152 (4th Cir. 1975). In Locklear, the fourth circuit held that allowing residents of several city school districts to vote in the elections of the county school district diluted the votes of the non-city residents, was over-inclusive, and therefore was a denial of equal protection. The fifth circuit distinguished the Locklear case on the following grounds:

> (a) that the City of Jasper had made a substantial investment in the county school board's vocational school and headquarters;
>
> (b) that the City of Carbon Hill charged no extra fee to the half of its students who were non-residents;
>
> (c) that there is a net outflow of tax money from the cities to the non-city area;
>
> (d) that the plaintiffs here did not prove that the city residents dominated the county school board elections.



Assuming arguendo that these facts are correct (petitioners contest the correctness of the latter two of these), the court below drew distinctions without differences. In both cases, the county school board performed certain regional administrative duties with the agreement of the other boards and with them bearing part of the cost. For instance, in Locklear, the Robeson County School Board administered the jointly-funded transportation system, an Educational Resoure Center and several federally funded projects, 514 F.2d at 1155. The school boards apparently decided that there was an economy of scale in certain functions and had agreed that one school board -- the county district board -- should administer the project. It could just have easily been one of the other boards.

> The city boards are authorized by law to perform these functions and provide these services for themselves. In placing these responsibilities on the county board, the city boards could undoubtedly retain contractual rights of supervision and control over the county board's performance. ... By mutual agreement, the various boards may subsequently decide to place the primary responsibility for the performance of one or more of these joint functions on one or more of the city boards.
> 514 F.2d at 1155-56 (emphasis in original).

To distinguish these facts, the fifth circuit cites an example of the county board providing a service to the city boards and examples of the city boards providing services to the county board or residents of the county district.

First the court below states that the City of Jasper made a substantial investment in the county district's vocational school. The evidence shows that the Jasper School Board contributed $212,500.00 for the construction of the Walker Area Vocational School, but that the Walker County School Board now pays all operating costs. State law did not require the construction contributions nor is the Walker County School Board required to let non-residents attend the vocational school. This compares with Locklear, where there was no state law requiring that the Robeson County Educational Resource Center be established, nor any mandate as to its funding.

Similarly, there is no state law which compels the Jasper School Board to rent a building to the Walker County School Board for $1.00 a year or which compels the Carbon Hill system to admit non-residents without charging fees. Each of these is a unilateral act on the part of the respective city board which can be unilaterally terminated. There may even be a quid pro quo, but the franchise has not been bartered for. Nor would the absence of fiscal exchanges alter the state statute. If anyone was to obtain the right to vote because county district residents attend school in the two cities, it should



be county residents. It is they who have an interest in the governing of the school system which their children attend. No such interest on the part of city residents has been shown. No evidence was presented to show that city residents even attend county district schools.

2. The Decision of the Court Below is Not in Harmony With This Court's Decisions Holding That The Cause of Dilution of the Vote Must be Closely Scrutinized to Determine That it Effectively Promotes a Compelling State Interest.

A. Petitioners should not have the burden of proving a compelling state interest in excluding non-residents from voting.

This Court has repeatedly held that in elections of general interest, restrictions on the franchise other than residence, age and citizenship must promote a compelling state interest in order to survive constitutional attack. Hill v. Stone, 421 U.S. 289 (1975); City of Phoenix, Arizona v. Kolodziejski, 399 U.S. 204 (1970); Evans v. Cornman, 398 U.S. 419 (1970); Kramer v. Union Free School District, 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969). The petitioners do not contend that the county school board elections are of a special nature such that city school board residents should be excluded, compare, Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973); they contend that such

persons are in fact non-residents. As such, their presence within the franchise dilutes the votes of petitioners and members of their class. Reynolds v. Sims, 377 U.S. 533, 562 (1964); Kramer v. Union Free School District, at 626.

Just as variations in the interests of property owners in a general election do not justify disenfranchising those not most directly affected by certain taxes, the collection of taxes does not automatically enfranchise non-residents. See, Salyer Land Co. v. Tulare Lake Basin Water Storage District, at 729, n. 9.

The creation of city school board creates separate and parallel bodies of government, just as certainly as deannexation. The city school boards are not a subpart of the county school board government but a new and independent governmental body. Yet the court of appeals below held that petitioners "have failed to sustain their burden of showing that their proposed 'fencing out' of Jasper and Carbon Hill residents from voting in county board elections is required by a compelling state interest." 6a. Not only did the court of appeals reverse the constitutional burden where petitioners claim the dilution of their vote, but petitioners urge that permitting non-residents to vote based on joint revenue statutes and acts of cooperation, where there is no reciprocal right, is not rationally related to any state interest.



Perhaps the state may broaden its franchise, eschewing all limitations of residence. But it must do so equally, and the franchise extension here runs only from city to county, and not vice versa.

B. In order to prove the dilution of their votes, petitioners are not required to demonstrate that the city residents dominate the elections.

The court below correctly recognized that Locklear v. North Carolina State Board of Elections, 514 F.2d 1152, 1153-54 (4th Cir. 1975), challenged the dilution of votes, not the domination of elections. 8a. Yet the court sought to find that city residents did not control the elections, 4a, and concluded that petitioners could not prevail "where there is no evidence of invidious discrimination which might arise from domination of elections by Jasper and Carbon Hill voters." 9a.[1]

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1. The facts upon which the court of appeals relied were that non-city voters outnumbered city voters. 4a. Petitioners took issue with this in their petition for rehearing, arguing that this cannot be determined from the record since election district lines do not follow school district boundaries and that this was an appeal from the granting of defendants' motions for summary judgment.

The court of appeals in essence treated the case as an election contest. But where dilution

(footnote continued to next page)

In this the court of appeals established a new standard for invidious dilution of the franchise -- it exists only when the elections are impermissibly "dominated." Petitioners contend that where the voting strength challenged constitutes nearly thirty per cent of the votes in a particular election, see 4a, the dilution is indeed invidious. Reynolds v. Sims, 377 U.S. 533, 561 (1964). The court of appeals did not correctly apply this concept, for it failed to recognize that unequal voting strength is not rendered invidious by its degree, but by its lack of justification. Mahan v. Howell, 410 U.S. 315 (1973).

C. Even if revenue support entitles non-residents to the franchise, it is not present in this case.

The court of appeals rested its decision in major part on its view that there existed a net outflow of taxes from the city to the county school system. 9a. While this Court does not sit to assure the correctness of every case, petitioners urge that this initial finding by an appellate court to affirm summary judgment was erroneous and has a bearing on whether review should be granted.

The court of appeals correctly found that 73 per cent of the 4 mill tax collected county wide went to the county school system, 5a. But

(footnote continued from preceding page)

is the issue, the question is not whether elections would have different results, but whether voting power is minimized. Chapman v. Meier, 420 U.S. 1 (1975).



it then assumed that 73 per cent of the revenue collected in the City of Jasper went to the county. This assumes, without basis from the record, that the revenues collected in the two cities exceeded 27 per cent of the revenue collected county wide.[1] It also ignores that fact that sales taxes probably flowed from county residents to the city school systems.

If petitioners' franchise is to be diluted by the inclusion of non-residents, then the basis for this unusual extension of the franchise should be justified by fact. Petitioners should be allowed their day in court to disprove the assumptions of the appellate court.

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1. The only facts in the record were the amount collected county wide, that the county school system received 73 per cent of the total, and the amount collected in the City of Jasper. The latter was 9 per cent of the total, so unless the Carbon Hill (a city with one-fifth the population of Jasper) revenue was double that of Jasper, there was a net flow of money from the county to the cities.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the court of appeals.

Respectfully submitted,

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ATTORNEYS FOR THE
PETITIONERS



LONNIE CREEL, JR., et al.,

Plaintiffs-Appellants,

v.

FRANK E. FREEMAN, et al., Defendants,

WALKER COUNTY BOARD OF EDUCATION, etc., et al.,

Defendants-Appellees.

No. 74-4105.

United States Court of Appeals
Fifth Circuit

May 10, 1976.

Before BROWN, Chief Judge, THORNBERRY, Circuit Judge, and MILLER,* Associate Judge.

MILLER, Associate Judge:

Appellants are residents of Walker County, Alabama, who live outside the city limits of Jasper and Carbon Hill, which are located in

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* Of the United States Court of Customs and Patent Appeals, sitting by designation.

the county. They challenge the constitutionality of Alabama statutes[1] under which residents of Jasper and Carbon Hill, who vote for officials, who, in turn, appoint the members of their respective independent city school boards (Ala.Code, tit. 52, § 152 (recompilation 1958)), also vote for some of

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1. Ala.Code, tit. 52, § 63 (recompilation 1958) provides in part:

> §63. Members.- The county board of education shall be composed of five members, who shall be elected by the qualified electors of the county.

Act No. 138 of the Special Session of the Alabama Legislature of 1965 (Acts of Ala., Vol. I) provides in part as follows:

> Section 1. The general supervision and control of the public schools of Walker County shall be vested in a county board of education, which shall consist of a chairman and four associate members.
>
> Section 2. The chairman of the board shall be a resident and qualified voter of any district or beat in the county. ... He shall be nominated and elected by the qualified voters of the entire county.
>
> Section 3. One member of the board shall be a resident and qualified elector of each of the four districts from which members of the county governing body are elected. ... One member of the board shall be nominated and elected by qualified electors of district one; one member shall be nominated and elected by the qualified electors of district two; one member

(footnote continued to next page)



the five members of the county board of education, which has jurisdiction outside the city limits of Jasper and Carbon Hill, and for the county superintendent of education. It is alleged that this system allows "persons with no substantial interest in the county school board to vote in its elections," thus "diluting" the votes of the noncity residents of Walker County. Appellants seek, among other things, to void and enjoin enforcement of the Alabama statutes insofar as these permit residents of Jasper and Carbon Hill to vote for members of the county board of education and the county superintendent of education, and to enjoin certification of the results of any election in which such city residents have voted for such officials. This appeal is from a summary judgment granted by the district court on motions of appellees, Frank Freeman and other members of the Walker County Board of Education, the members of the Board of Supervisors of Elections of Walker County, and Robert Cunningham, Walker County Superintendent of Education. We affirm.

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(footnote continued from preceding page)

> shall be nominated and elected by the qualified electors of district three; and one member shall be nominated and elected by the qualified electors of district four.

Act No. 86 of the Alabama Legislature of 1935 (Local Acts of Ala.) provides for countywide election of the Walker County Superintendent of Education.

## FACTS

The City of Jasper is located in district one, and the City of Carbon Hill is located in district two. No Jasper or Carbon Hill residents vote in districts three or four. In the June 1974 primary election (tantamount to final election), a total of 2,357 votes was cast in district two for county board member -- 755 from Carbon Hill and 1,602 from outside Carbon Hill. In the May 1972 countywide primary election for chairman of the county board, a total of 13,500 votes was cast -- 4,161 from Jasper and Carbon Hill and 9,339 from the rest of the county. Appellants do not allege that Carbon Hill or Jasper voters dominate the elections in their respective county school districts, much less the countywide elections. Indeed, none of the incumbent board members lives in Jasper or Carbon Hill.[2]

The building which houses the offices of the Walker County Board of Education and its workshop and textbook center is located within the city limits of Jasper. The Jasper school board paid $100,000 for the purchase of the property and rents it to the county board for $1 a year.

The Walker Area Vocational School, which is also located within the city limits of

2. The incumbent county superintendent of education resides within the city limits of Jasper. In the May 1974 primary election for this office, a total of 15,889 votes was cast -- 4,929 from Jasper and Carbon Hill and 10,960 from outside the two cities.



Jasper, is operated by and under the exclusive control of the county board. However, the Jasper school board contributed $212,500 towards its construction. In 1974 the vocational school had 691 students of which 114 lived inside the city. A charge of $50 is made for each city student in attendance, and the Jasper school board pays it.

Within the city limits of Jasper is Walker High, a senior high school, which in 1974 had an enrollment of 950 students. Of these, 488 lived outside the city limits and 257 were transported to the school by the county board.

In 1974, the Carbon Hill school system had 965 students of which 482 lived outside the city limits. They were transported by buses owned and operated by the county board and were charged no fee.

A 4-mill tax is collected countywide, including property within the city limits of Jasper and Carbon Hill. The total collected in 1973 was $394,524, including $35,501 from property within the city limits of Jasper. Of the total, 73 percent went to the county board under a minimum per pupil school program. This would mean that of the $35,501 paid on property in Jasper, $25,915 went to the county board.

## OPINION

The facts of this case clearly show a substantial interest of Jasper and Carbon Hill residents in the operation of the Walker County school system and do not show domination by

such residents over county school board elections. Accordingly, appellants have not met their burden of demonstrating that the Alabama statutes and their application here are irrational or wholly irrelevant to the state's objective of electoral participation in the selection of county school board members. McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); Clark v. Town of Greenburgh, 436 F.2d 770 (2d Cir. 1971); Glisson v. Mayor & Councilmen of Savannah Beach, 346 F.2d 135 (5th Cir. 1965); Spahos, v. Mayor & Councilmen of Savannah Beach, 207 F.Supp. 688 (S.D.Ga.), aff'd 371 U.S. 206, 83 S.Ct. 304, 9 L.Ed.2d 269 (1962).

Moreover, appellants have failed to sustain their burden of showing that their proposed "fencing out" of Jasper and Carbon Hill residents from voting in county board elections is required by a compelling state interest. Evans v. Cornman, 398 U.S. 410, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970); Kramer v. Union School District, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed. 2d 583 (1969); Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975). If, as appellants argue, the residents of Jasper and Carbon Hill had "no more interest in the affairs of the county school board than the residents of the next county," a compelling state interest in excluding them from voting would no doubt exist. As the Supreme Court said in Reynolds v. Sims, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506, 523 (1964), "the right of suffrage can be denied by ... dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."



However, the argument simply doesn't square with the facts in this case.

Appellants have called our attention to Locklear v. North Carolina State Board of Elections, 514 F.2d 1152 (4th Cir. 1975), in which it was held that extension of the franchise in county school board elections to residents of city school districts, and the consequent "dilution" of the vote of the non-city residents, was "over-inclusive" and constituted denial of equal protection of the laws. Justification for city residents' participation in the county school board elections was that the county board (1) administered the transportation system for the county as a whole, including the districts under the city school boards; (2) operated an Educational Resource Center for the benefit of all county and city pupils; and (3) administered a number of federally-funded projects. The Fourth Circuit held that the city voters' interest in these functions did not amount to a compelling state interest that city voters participate in the election of certain county school board members. It said:

> We do not doubt that the fact that the county board performs some functions for the benefit of the city boards gives the electorate of the city boards an interest in the operation of the county board, justifying some voice and some control in how the joint functions are performed.

However, it observed that the joint functions performed by the county school board were by agreement with the city school boards and not because of statutory mandate; that contractual rights of supervision and control over the county school board's performance under an agreement enabled the city school boards to participate in the centralized functions to the extent of their interest, rendering electoral participation in the selection of county school board members by residents of the city school districts unnecessary.[3] The court pointed out that while members of the city school boards were elected exclusively by the voters residing within each city board district, seven of the eleven county school board members were elected by voters residing in both the city school board districts and the county board jurisdiction. It was the "dilution" of the county board jurisdiction residents' voting power by residents of the city board districts in the election of the seven members of the county school board which the plaintiffs had attacked.

The factual differences between this case and Locklear are readily apparent. For example, the substantial investment by Jasper residents in the vocational school and in the county board building and the fact that half the Carbon Hill school system's pupils come

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3. The court determined that the extension of the franchise in county school board elections to residents of city school districts was "over-inclusive" for another reason, namely: the county school board administered the schools in its own jurisdiction, and there was "no cooperative effort between the county and city boards in this area."



from outside Carbon Hill and pay no fee have no parallel in Locklear. Nor in Locklear does it appear that there was any net outflow of property tax funds from a city to the county. We are persuaded that to require such matters to be left to agreement between the city school boards and the county school board rather than to a rational and relevant plan established by the Alabama legislature, particularly when there is no evidence of invidious discrimination which might arise from domination of elections by Jasper and Carbon Hill voters, would be to unnecessarily intrude upon an area reserved to the singular capability and responsibility of the legislature.

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OFFICE OF THE CLERK

August 12, 1976

Edward W. Wadsworth,
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL COUNSEL OF RECORD

No. 74-4105
Lonnie Creel, Jr., et al
v. Frank E. Freeman, et al;
Walker County Board of Education,
etc., et al

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12. The petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of mandate.

Very truly yours,

EDWARD W. WADSWORTH, CLERK

BY: s/ Susan M. Gravois
Deputy Clerk



IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION

| | | |
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| LONNIE CREEL, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | Civil Action |
| | ) | No. 74-G-78-J |
| vs. | ) | |
| | ) | [Filed: November |
| FRANK E. FREEMAN, et al., | ) | 15, 1974] |
| | ) | |
| Defendants. | ) | |

ORDER

This cause came on to be heard on the motions of defendant, Walker County Board of Education, and defendant, members of the Board of Supervisors of Elections of Walker County, Alabama, for summary judgment. The court has considered these motions and is of the opinion that they are due to be granted. The court bases this determination on authority which includes the following cases: Clark v. Town of Greenburgh, 436 F.2d 770 (2d Cir. 1971); Glisson v. Savannah Beach, 346 F.2d 135 (5th Cir. 1965). The court places special reliance on Rutledge v. State of Louisiana, 330 F.Supp. 336 (W.D. La. 1971).

Accordingly, it is ORDERED, ADJUDGED and DECREED that the above motions for summary judgment be, and the same hereby are, granted.

DONE this 15th day of November, 1974.

s/J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION

| | | |
|---|---|---|
| LONNIE CREEL ET AL., | ) | [Filed: November 26, 1974] |
| PLAINTIFFS | ) | |
| VS. | ) | CIVIL ACTION NO. 74-G-78-J |
| FRANK E. FREEMAN ET AL., | ) | |
| DEFENDANTS | ) | |

ORDER

This cause came on to be heard on the motions of Defendant, Robert E. Cunningham, who was sued in said cause as a representative of the residents of those cities having an independent school board, for Summary Judgment. The Court has considered this Motion and is of the opinion that it is due to be granted. The Court bases this determination on authority which includes the following cases: Clark v. Town of Greenburgh, 436 F.2d 770 (2nd Cir. 1971); Glisson v. Savannah Beach, 346 F.2d 135 (5th Cir. 1965). The Court places special reliance on Rutledge vs. State of Louisiana, 330 F. Supp. 335 (W.D. La. 1971).

Accordingly, it is ORDERED, ADJUDGED AND DECREED that the above Motion for Summary Judgment, be, and the same is hereby granted.

DONE this 26th day of November, 1974.

s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.



United States Constitution, Amendment I

> Congress shall make no law***abriding the freedom of speech***; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Amendment XIV, §1

> ***No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ***nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42, §1983

> Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected,, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Code of Alabama (Recomp. 1958), Title 52, § 63. Members. -- The county board of education shall be composed of five members, who shall be elected by the qualified electors of the county. They shall be persons of good moral character, with at least a fair elementary education, of good standing in their respective communities, and known for their honesty, business ability, public spirit and interest in the good of public education. No member of the county board of education shall be an employee of said board. (1927 School Code, § 87.)



Act No. 138 of the Special Session of the Alabama Legislature of 1965 (Acts of Ala., Vol.I)

AN ACT

To provide further for the control, supervision and administration of public schools in Walker County; to fix the qualifications and to provide for the election of a chairman and associate members of the county board of education; to fix their terms of office; to provide for their compensation, and the manner of filling vacancies in office.

Be It Enacted by the Legislature of Alabama:

Section 1. The general supervision and control of the public schools of Walker County shall be vested in a county board of education, which shall consist of a chairman and four associate members.

Section 2. The chairman of the board shall be a resident and qualified voter of any district or beat in the county, a person of good moral character, of good standing in his community, known for his honesty, business ability, public spirit and interest in the good of public education. He shall be nominated and elected by the qualified voters of the entire county; he shall take office on the day following his election and qualification and shall serve for a term of six years and until his successor is elected and qualified.

Section 3. One member of the board shall be a resident and qualified elector of each of the four districts from which members of the

county governing body are elected. Each shall be a person of good moral character, of good standing in his community, known for his honesty, business ability, public spirit and interest in the good of public education. One member of the board shall be nominated and elected by qualified electors of district one; one member shall be nominated and elected by the qualified electors of district two; one member shall be nominated and elected by the qualified electors of district three; and one member shall be nominated and elected by the qualified electors of district four.

* * *

Section 6. All laws or parts of laws which conflict with this Act are repealed.

Section 7. The provisions of this Act are severable. If any part of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Supreme Court, U. S.
FILED
DEC 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

**No. 76-655**

LONNIE CREEL, JR., *et als., etc.*,
*Petitioners,*

vs.

FRANK E. FREEMAN, *et als., etc.*,
*Respondents.*

***PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT***

## BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

**No. 76-655**

LONNIE CREEL, JR., JACK SULLIVAN, CLINT FOREMAN, TOM W. GAINES, DAN WHITAKER, AND JAMES M. ELLISON, individually and for all others similarly situated,

*Petitioners,*

**vs.**

FRANK E. FREEMAN, E. K. BARNES, CLARENCE HENDRIX, EUGENE McDANIEL and DORIS ROBERTS, individually, as members of the Walker County Board of Education, and on behalf of all other school boards and school board members similarly situated; ROBERT E. CUNNINGHAM, individually and as Superintendent of Education of Walker County, and on behalf of all other Superintendents similarly situated; PROBATE JUDGE FLORA L. STEWART, SHERIFF HOWARD TURNER, and CIRCUIT CLERK SYLVESTER ANTON in their official capacities as members of the board of supervisors of elections and on behalf of all other boards of supervisors similiarly situated,

*Respondents.*

***PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT***

## BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS

## STATEMENT OF THE CASE

This action began with a Complaint of Plaintiffs being filed on January 28, 1974, with present Petitioners seeking to represent the class of Plaintiffs which resided outside the corporate limits of any town having an independent school board.

The Petitioners reside outside the corporate limits of any city or town having an independent school board and the Respondents in said suit are the superintendent of education and members of the board of education and members of the board of election supervisors of Walker County. Each Respondent was originally sued as a representative of the class of officials of 36 other counties.

The District Court made an initial determination in favor of a class action status but after extensive discovery, the District Court ruled that the class action could not be maintained as to the Respondents.

Neither the class action question nor the three-judge Court question is subject to the Court's review in connection with this appeal.

Petitioners appealed the action of the lower Court and the Fifth Circuit Court of Appeals affirmed the ruling of the District Court.

The Petitioners contend that by allowing city residents of Jasper, Alabama and Carbon Hill, Alabama, both having independent school systems, both located in Walker County, Alabama, to vote for the members and for the chairman of the Walker County Board of Education, such dilutes the votes of proper non-city electors and denies them equal protection of the law in violation of the Fourteenth Amendment. The Petitioners specifically challenge the constitutionality of Title 52, §63, of *The Alabama* Code, 1940, as Recompiled in 1958.



Title 52, §63, of *The Code of Alabama,* 1940 as Recompiled in 1958, provides in part the following:

> "The County Board of Education shall be composed of 5 members, who shall be elected by the qualified electors of the county. . ." (Appendix Page A1).

A local act applying to Walker County fixes the qualifications of and provides for the election of a chairman and associate members of the County Board of Education. In Act No. 138 of the Special Session of the Alabama Legislature of 1965, in *Acts of Alabama,* Volume No. 1, at Page 188, we find in part the following:

> *Section 1* provides for the general supervision and control of the public schools of Walker County being vested in the County Board of Education consisting of a chairman and 4 associate members. . .
>
> *Section 2* provides that the Chairman of the Board shall be a resident and qualified voter of any district or beat in the county and that he shall be nominated and elected by the qualified voters of the entire county. . .
>
> *Section 3* provides that one member of the Board shall be a resident and qualified elector of each of the four districts from which members of County governing body are elected and that each district shall elect a member of the board of education. . . (Appendix Pages A1, A2, & A3).

Walker County surrounds the cities of Jasper and Carbon Hill on all four sides and no qualified voter in Walker County, including residents of Carbon Hill and Jasper, Alabama, are excluded from voting in the Walker County Board of Education election. The electors all vote for the Chairman and all vote for the Board member of their respective district.

Robert E. Cunningham, Superintendent of the Walker County Board of Education, resides within the City limits of Jasper, Alabama.

*Location of Educational Facilities:*

The Office of the Walker County Board of Education, which also houses the workshop and textbook center is located within the City limits of the City of Jasper, Alabama. The building is owned by the Jasper City Board of Education and is rented to the County Board for $1.00 per year.

The Walker Area Vocational School, under the supervision of the Walker County Board of Education, is also located within the City limits of Jasper, Alabama.

*Joint Educational Activities:*

The Walker County Board of Education and the Jasper City Board of Education have a "joint venture" known as the Walker Area Vocational School, which is located inside the City limits of Jasper, Alabama, and it is under the exclusive control of the Walker County Board of Education, who pays all operating costs. In 1974, 691 students attended the Walker Area Vocational School, 114 of which lived within the City limits of Jasper, Alabama. The Jasper City Board of Education contributed $212,500.00 toward its construction and pays $50.00 for each student residing within the City of Jasper who attends.

In 1974, the Jasper City Board of Education had an enrollment of 2,810 students. The Walker High School, located in the City limits of Jasper, Alabama, had an enrollment of 950, of which 488 students live outside the city limits. There are no limits on outside students attending the City schools.

Also, in 1974, the Carbon Hill School System had an enrollment of 965, of which 482 students live outside the



City limits. No fees were charged in connection with the out-of-city students.

The number of city students attending other county schools is unknown.

*Finances*

Revenues are obtained from various sources and one of such sources is a 4 mill tax assessed and collected county-wide including on the residents of Jasper and Carbon Hill, Alabama, and the amount of tax collected on lands within the City of Jasper, Alabama was $35,501.80 in 1974, of the total of $394,524.28, which was the total of the 4 mill tax collected county-wide and paid over to the Walker County Board of Education. The $35,501.80 amounts to 8.99% of the total amount paid over to the Walker County Board of Education by virtue of the 4 mill tax.

## SUMMARY OF ARGUMENT I

**The issue in the present case is uniquely narrow, and no amount of strained semantics can convert it into one warranting review by certiorari.**

**It is apparent that the allowing of the residents of the Cities of Jasper and Carbon Hill, both having independent school boards, to vote for the chairman and members of the Walker County Board of Education neither "dilutes" or "debases" the votes of the non city residents, nor denies the non-city residents the equal protection of the law since the residents of the cities have a legitimate interest in voting insuch elections.**

**The legitimate interest of the cities is evidenced by the taxes that are paid which make up a portion of the budget of the Walker County Board of Education; the investment of moneys made by the Jasper City Board of**

**Education into the Vocational School, which is a "joint venture" with the Walker County Board of Education, and which facility is located within the corporate limits of the City of Jasper, Alabama and which is operated under the exclusive control of the Walker County Board of Education, with city students attending from Jasper. Further, county students comprise one half of the student body of the Walker High School and Carbon Hill High School, both city schools, and the students attend without the payment of fees.**

**It is also evident that Petitioners cannot demonstrate that Title 52 of *Code of Alabama*, (Appendix Page A1) or Act No. 138, *Acts of Alabama*, (Appendix Pages A1, A2, & A3), create an arbitrary classification, show discrimination, or that each or either is based on irrational objectives or that the objectives are wholly irrelevant means of achieving the States' objectives.**

## I. THE DECISION OF THE LOWER COURT IS CLEARLY CORRECT.

### ARGUMENT

Petitioners predicate their attack on Title 52, §63, of *The Code of Alabama*, 1940, as Recompiled 1958 (Appendix Page A1), and on Act No. 138, Special Session of The Alabama Legislature, 1965, *Acts of Alabama*, Vol. 1 (Appendix Pages A1, A2 & A3) on the conception that city residents cannot vote in county elections without "diluting" the vote of those residents of rural areas outside the cities of Jasper and Carbon Hill, Alabama. "Dilution" as used by the Petitioners, is a clever disguise under which Petitioners are trying to get this Court to do what the Supreme Court has said the Equal Protection Clause will not permit: the "fencing out" from county elections of a substantial part of counties' residents solely because they reside in an additional jurisdiction, i.e., a town. *Evans v. Cornman*, 398 U.S. 419, 423, (1940). This case does not involve "dilution" as that term has been interpreted by the Courts. Each person who votes in these elections has his vote counted as "one". No voter's ballot is weighed more heavily than that of "others". *Wesberry v. Sanders*, 376 U.S. 1, (1964); *Reynolds v. Sims*, 377 U.S. 533, (1964); *Gray v. Sanders*, 372 U.S. (1963); and *Hadley v. Junior College District*, 397 U.S. 50 (1970).



This action is unusual in that Petitioners do not seek to guarantee the right to vote to a previously disenfranchised class, but instead, seek to take away the right to vote from persons presently enjoying that right. Petitioners allege a dilution of their vote, not through a system of improperly apportioned districts, but through a process of permitting persons to vote who allegedly have no interest in the election, and therefore, no right to participate therein.

In *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), the Court said:

> "Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."

In *Kramer v. Union Free School District*, 395 U.S. 631, 626, 627 (1969), the Court said:

> "Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.
>
> Thus, State apportionment statutes, which may *dilute* the effectiveness of some citizens' vote, receive close scrutiny from the Court, no less rigid an examination is applicable to statutes *denying* the franchise to citi-

> zens who are otherwise qualified by residence and age. States granting the franchise on a selective basis always pose the danger of denying some citizen any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged State statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling State interest."

There is no Constitutional requirement that all voters participating in an election must be similarly affected by the outcome of the election, nor is there a Constitutional requirement that the interest of all voters must be identical. In *Kramer, supra,* at 395 U.S. 632, the Court said:

> "Whether classifications allegedly limiting the franchise to those resident citizens 'primarily interested' deny those excluded equal protection of the laws depends, *inter alia,* on whether all those excluded are in fact substantially less interested or affected than those the statute includes. In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal."

In *Cipriano v. City of Houma,* 286 F. Supp. 823 (1968), we find the following:

> "The Equal Protection Clause does not command state legislatures to make their laws conform to hydraulic principles by seeking the common—and lowest level. Equal Protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinctions have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary."



Section 63 of *The Code of Alabama,* 1940, as Recompiled 1958, (Appendix Page A1), as well as Act 138 of the 1965 Session of The Alabama Legislature, *The Acts of Alabama,* Volume I, (Appendix Pages A1, A2 & A3), do not create an arbitrary classification, and the Petitioners cannot discharge their heavy burden by demonstrating that either Section 63 or Act Number 138, create such an arbitrary classification. *McGowan v. Maryland,* 366 U.S. 420 (1961). Proof that §63 or Act 138 "affects some groups of citizens differently than others" (*McGowan v. Maryland,* 366 U.S. at 425, or that "in practice [it] results in some inequality" (*Spahous v. Savannah Beach,* 207 F. Supp. 688 (S.D. Ga. 1962) *aff'd per curiam,* 371 U.S. 206 (1962)), is *not sufficient,* because "every discrimination between groups of people" does not rise to the dimensions of "a Constitutional denial of equal protection", *Oregon v. Mitchell,* 400 U.S. 112 (1970). In addition to proving the discrimination, the Petitioners must demonstrate that §63, Title 52, *The Code of Alabama,* 1940, as Recompiled 1958 (Appendix Page A1), or that Act 138 of *The Acts of Alabama,* 1965, Volume 1 (Appendix Pages A1, A2 & A3), are not based upon *rational objectives* (*Spahous v. Savannah Beach, supra* at 692) or that they are "wholly irrelevant" means to achievement of the States' objective. *McGowan v. Maryland,* 366 U.S. at 425. This places an impossible burden on Petitioners, because §63, and Act 138 are clearly rational means to a rational end: to secure the vote in school board elections for all residents of Walker County. All the voters vote for the position of Chairman of the Board of Education and all vote for the school board member of their district.

The Petitioners in this cause cannot demonstrate that §63 or that Act 138 create an arbitrary classification. Neither §63 nor Act 138 discriminate against anyone be-

cause it simply gives the right to vote to all qualified electors in Walker County, Alabama.

The classification must have some reasonable basis and does not fail because it in practice results in some inequality. If any state of facts reasonably can be conceived that will sustain it, the existence of that state of facts must be assumed. And those who assail the classification must carry the burden that it does not rest upon any reasonable basis, but it is essentially arbitrary. In *McGowan v. State of Maryland,* 366 U.S. 420, the Supreme Court stated the rule as follows:

> "Although no precise formula has been developed, the Court has held that the 14th Amendment permits the state a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The Constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the states' objectives. State legislatures are presumed to have acted within their Constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts can reasonably be conceived to justify it."

(I) *Recent Supreme Court Decisions Affecting Petitioners' Position:*

Petitioners, in the instant case, asked for judicial relief, circumscribing the residence requirement for county voting to achieve the exclusion of town residents, so that a substantial segment of the population will be "fenced out" in school affairs in the county. In several recent cases, the Supreme Court has refused to let State officials do what the Petitioners are asking this Court to do in the instant case. There are three lines of authority in recent decisions of the Supreme Court which militate against the Petitioners' position. The Petitioners can prevail in this case only if the



Court ignores all three lines of authority. *First,* the Equal Protection Clause looks with disfavor on efforts to "fence out" voters from participating in elections in which they have some interest. *Evans v. Cornman,* 398 U.S. 419 (1970); *Carrington v. Rash,* 380 U.S. 89 (1965); *Kramer v. Union Free School District,* 395 U.S. 621 (1969); and *Phoenix v. Kolodziejski,* 399 U.S. 204 (1970). *Second,* the Equal Protection Clause does not permit the disenfranchisement of otherwise qualified voters on the grounds that they are "less interested" than others in the outcome of an election. *Kramer v. Union Free School District,* 395 U.S. 621, (1969); *Cipriano v. Houma,* 395 U.S. 701 (1969); *Evans v. Cornman,* 398 U.S. 419 (1970); and *Phoenix v. Kolodziejski,* 399 U.S. 204 (1970). *Third,* the Equal Protection Clause looks with suspicion on unreasonably restrictive *residence* requirements. *Dunn v. Blumstein,* 405 U.S. 330 (1972); *Evans v. Cornman,* 398 U.S. 419 (1970); *Carrington v. Rash,* 380 U.S. 89 (1965); *Oregon v. Mitchell,* 400 U.S. 112 (1970); and *Amos v. Hadnot,* 405 U.S. 1035, *aff'ing* 320 F. Supp. 107 (M.D. Ala. 1970).

(II) *Cases of Major Importance Supporting Respondents' Positions:*

Five "Equal Protection" Cases should be considered in connection with the case at hand. All five cases join to place an insurmountable burden on the Petitioners and they compel the conclusion that this Court must sustain the validity of §63, and Act No. 138. In *Evans v. Cornman,* 398 U.S. 419, (1970), the United States Court condemned the Maryland Registration Boards' effort to exclude from participation in the State elections, those people who lived on a federal enclave. The Court reasoned that the Federal employees in question had an *obvious interest* in the affairs of the *state jurisdiction which surrounded them* (emphasis added).

The United States Court of Appeals for the Fifth Circuit in *Glisson v. Savannah Beach,* 346 F. 2d 135 (5th Cir. 1965) sustained the Constitutionality of a statute which permitted voting in the municipal elections of Savannah Beach by persons owning property in the town, who resided outside the City limits in outlying Chattam County. In a rationale equally applicable to the case at bar, that Court explained as follows, 346 F. 2d at 137:

> 'It is apparent from the fact of the legislation that there could be a logical and sensible reason for permitting non-residents owning property in municipality to vote on an equal basis with the resident persons . . . *The nexus between the two is that each of them obviously has an interest in the operation of the city government.*"

In a companion case, the United States Supreme Court affirmed the same decision reached by a "three-judge" district court. *Spahous v. Savannah Beach,* 207 F. Supp. 688 (S.D. Ga. 1962) *aff'd per curiam,* 371 U.S. 206 (1962).

In the case of *Clark v. Greenburgh,* 436 F. 2d 770 (2nd Cir. 1971), the United States Court of Appeals for the second Circuit sustained a statute permitting city residents to vote in county elections. The Court rejected a "dilution" argument like the one made in this case, and reasoned that a county residents' vote is not "diluted" simply because he might have a greater interest in the outcome of a county election than other voters who live in the city. Noting that the city residents did have an interest, however small, in the outcome of county elections, the Court pointed out that city residents paid about 5% of the taxes levied by the county and that they had access to the county's recreational facilities.

Finally, in *Rutledge v. Louisiana,* 330 F. Supp. 336, (W.D. La. 1971), a case on "all-fours" with the instant



case, a United States District Court sustained a statute permitting residents of a city with a separate school system to vote in board of education elections in the surrounding parish. The Court refused to "fence out" city residents who had at least *some* interest in the county election, the Court based its interest on three facts, all of which are present in the case, viz: (1) some city residents attended parish schools; (2) city residents paid part of the taxes used to run the parish schools; and (3) part of the parish school system's facilities were located in the city. This is exactly the situation in Walker County, in that some residents attend county schools; city residents pay part of the taxes used to run the county schools; and part of the county school system's physical facilities are located within the city. It appears that a common thread is contained in the case of *Glisson, Spahous, Clark* and *Rutledge,* in that they all contain a judicial reluctance to interfere with State legislative enactments extending the right to vote to a class of voters, so long as the class has *some tangible* interest, irrespective of the degree, in the outcome of the election in which they are permitted to participate. This judicial reluctance logically follows the principle that, since State legislatures have the *primary* responsibility for fixing voter qualifications for local elections, the Equal Protection Clause permits them a "broad discretion." *Lassiter v. North Hampton County Board of Elections,* 360 U.S. 45 (1959). Clearly, this "broad discretion" must extend to permitting the Alabama Legislature to conclude that the citizens of Carbon Hill and Jasper, Alabama, have sufficient interest to participate in the affairs of the county which surrounds them, since it appears that the voters residing in the city are substantially affected by the decisions of the county board and that they have a substantial interest in the election of the county board, since the county

maintains, operates and supervises the Walker Area Vocational School, which includes those students residing with the city, Walker County Board of Education Office, textbook center, and garage, is located within the City limits of Jasper, Alabama, and the residents of the City of Jasper and the City of Carbon Hill, Alabama, assist in paying a portion of the taxes with which the Walker County Board of Education operate. These functions of the county boards directly and substantiably affect residents of these cities. *Hadley v. Junior College District of Metropolitan Kansas City,* 397 U.S. 50, 54 (1970).

Because of the above reasons and because the same considerations prevailed in *Glisson, Spahous, Clark* and *Rutledge,* we feel that the same considerations command a course of judicial restraint in the case at bar.

The Petitioners also allege that Title 52 of §63, *The Code of Alabama,* 1940, as Recompiled 1958, creates a "dual voting" situation but this is incorrect in the true consideration of the same. The point that Petitioners are making is that because of the provision of §63, and Act No. 138, the city residents of Jasper and Carbon Hill enjoy the additional right of voting for county school board members.

There seems to be no problem with allowing city residents the "vote" since they are also county residents and since they are likewise allowed to vote for County Sheriff and County Commissioners (Ala. Constitution, Act V, 138, and Amendment 35) (Appendix Page A3), even though the cities have their own police forces and even though the residents look to the local city or town officials for the paving of streets and such other benefits.

Instead of being classed as a "dual voting" situation, it would appear more correctly classed as an "additional voting" privilege because such city residents pay taxes, have



requisite interest in the County Board of Education activities and because of joint activities between City Boards and the County Board of Education.

Finally, the Court's attention is directed to three additional considerations, not averred to above, which command a course of judicial caution.

*First,* as the Second Court of Appeals pointed out in *Clark v. Town of Greenburgh,* 436 F. 2d 770 (2nd Cir. 1971), it might well *violate* the Equal Protection Clause to exclude *bona fide* county residents from participating in county affairs *solely* because they happen to be inhabitants of a town.

*Second,* based on the undisputed facts contained above, Carbon Hill and Jasper residents have some interest, however remote, in the school affairs of Walker County. Hence, they can be excluded from participating in those affairs only if this Court utilizes a "calculus of interest" test which compels the disenfranchisement of a class of voters who ostensibly have *less* interest than other voters in the outcome of an election. Two reasons are evident why such a test should not be given this Court's sanction. For one, it would dignify speculation as to an extent that the law cannot countenant. The physical location of one's home does not necessarily dictate the degree of his interest in education. Neither does it fall that one who is interested in education in Carbon Hill or Jasper, Alabama, is *less* interested in Walker County. To the contrary, many of the strongest supporters of quality education in Carbon Hill and Jasper, Alabama, are the strongest supporters of quality education in Walker County. For the second reason, judicial economy calls for the rejection of such a test because it would inevitably generate many new controversies and many new spin off cases.

*Third,* if the Petitioners prevail, then this precedent will lead to new cases challenging the rights of city inhabitants to vote in elections for Probate Judge, County Commissioners, and Sheriff. This case, if the Petitioners succeed, will signify the beginning of a campaign in the courts to effectuate fundamental changes in the relationship between city and county government in Alabama. Any spirit of cooperation presently existing between state, county and local government would be hampered and education would reap the fruits of such action.

If cities and counties are to be made mutually exclusive jurisdictions in Alabama, the demand for this fundamental change should be addressed, initially to the State Legislature. As noted in *Glisson v. Savannah Beach,* 346 F. 2d 135 (5th Cir. 1965), there has been no allegation or evidence shown on behalf of Petitioners that they are foreclosed from obtaining the relief that they may be seeking from the Legislature of the State of Alabama, and Petitioners in this case are not foreclosed from obtaining relief from the legislature as were the Petitioners in *Baker v. Carr,* 269 U.S. 186.

## SUMMARY OF ARGUMENT II

**Petitioners have labored in their attempts to convince the Court that this case is in conflict with the case of *Locklear v. North Carolina State Board of Elections,* 514 F. 2d. 1152 (4th Cir. 1975), wherein the Court held that the interest of the city voters in functions performed by the county boards, which were namely: student transportation, the educational resource center and the projects for special students, individually and collectively, did not amount to a compelling state interest and that city voters could not participate in the election of County School Board members.**



**The *Locklear* case differs from the case at hand in the areas of taxes being paid by the cities of Jasper and Carbon Hill which are used to make up a portion of the budget of the Walker County Board of Education; operation of a "joint venture" vocational school which is located within the corporate limits of the Jasper City Board of Education and which is operated exclusively by the County Board of Education, but which was constructed in part by substantial moneys from the City of Jasper to which facility city students from the City of Jasper attend and further that county students comprise about one half of the student body for the largest high school located in the City of Jasper and Carbon Hill. The present case also differs from *Locklear* in the manner of voting for board members in that *Locklear,* 11 county board members were elected, 7 of which were elected by all voters residing in 6 jurisdictions, both county and five cities, and four were elected exclusively by the voters of the county jurisdiction, excluding residents of the cities. In the case before the Court, the Chairman is elected at large and one member is elected solely by the votes of each of 4 individual districts, giving the residents of said districts all a vote for the Chairman and one vote for the respective member for his district.**

## II. THERE IS NO CONFLICT IN THIS DECISION AND NO QUESTION OF IMPORTANCE IS PRESENTED.

### ARGUMENT

Petitioners contend that the decision below is in conflict with the decision of the Fourth Circuit in *Locklear v. North Carolina State Board of Elections,* 514 F. 2d 1152 (4th Cir. 1975). *Locklear* can be distinguished in several

ways from the case at hand. In *Locklear,* there were six Boards of Education, five of which were city Boards of Education, and one of which was a County Board of Education. The County Board of Education had eleven members of which seven were elected *by the vote of the City units and the County residents* (emphasis added) and four persons were elected exclusively by the County electorate. Also, in *Locklear,* the facts showed that *each Board of Education had exclusive geographical jurisdiction* (emphasis added) within the area that it operated and there was no showing that there was any tax collected in the City administrative units which went to make up the revenue of the County School Board. Also, in *Locklear,* the Court found that the only connection between the County and City Boards was the following: (a) The County Board of Education provided all of the transportation for all school boards in the County, (b) The County and City Boards had a joint function, being an Educational Resource Center, which was used by all of the Boards, (c) The County Board of Education administered certain Federal projects and (d) The County Board of Education had the right to annex certain property to the City which had formerly not been City property with the consent of City residents and through approval of certain other persons and agencies. The Court, in *Locklear,* felt that there was no compelling state interest to allow the City residents to vote in that particular case and made an observation that there was nothing to show that the agreements made between the City and County Boards were not subject to being changed.

The case at hand is distinguished from *Locklear* in that taxes flow from the Cities of Carbon Hill and Jasper to the Walker County Board of Education, which forms a part of the county school board budget. Also, the Walker County Board of Education exclusively owns and operates



the Walker Area Vocational School within the geographical jurisdiction of the Jasper City Board of Education and that this was not subject to being changed since the Walker County Board of Education owns and exclusively controls the same. Differences are also evident in the manner in which the School Board members were elected. In the fact that the Board of Education members of the City of Jasper and Carbon Hill are appointed and not elected as they were in *Locklear.* The argument made in *Locklear* that the joint agreements were subject to being changed, is substantially affected by the case of *Little Thunder v. State of South Dakota,* 518 F. 2d 1253, in which the Court refused to consider the argument of the State that the unorganized counties might choose to form an organized county, but the Court said the issue at stake was whether the residents of the unorganized counties *"presently"* (emphasis added) have a voice in their government.

In *Little Thunder v. State of South Dakota,* 518 F. 2d 1253, the Plaintiffs who were residents of unorganized counties, brought an action contending that state law preventing them from voting for County government officials was in derrogation of their rights to equal protection of the law. The State of South Dakota is divided into 67 county units, which are further divided into organized and unorganized counties. A statutory method was enacted of organizing a county government through petitions and referrendum and at the present time, the only unorganized counties are those in which the Plaintiffs reside. The organized counties have a full compliment of elected county officials whose task is to administer the affairs of local government. The residents of the unorganized counties were not permitted to vote for the county officers in the organized counties. The State also argued that the unorganized counties could organize and divest the organized

county government of power and that this contingency justifies restriction of the franchise. The Eighth Circuit Court of Appeals held that the District Court had applied the wrong legal standard in assessing the Constitutionality of the State's action, and that there existed under the record no compelling state interest justifying the denial of Plaintiffs' right to vote for their governing officials. The Court was concerned with the question of whether the residents of the unorganized counties "*presently*" have a voice in their local government.

Petitioners apparently were concerned about the comment by The Court of Appeals that there is no domination shown by the residents of the City of Jasper and Carbon Hill over the County School Board elections.

Such domination existed in *Locklear v. North Carolina State Board of Elections*, (supra) since there were eleven members of the county board of education of which seven were elected by the vote of the city units and the county residents elected only four members through its exclusive vote. This was obviously unfair, but such does not appear in the case at bar, and with all of the apparent differences, *Locklear* simply cannot be considered controlling authority in view of the facts of the present case since Petitioner cannot support any argument that *Locklear* is substantially undistinguishable from the case at hand.

Petitioners also question whether they should have the burden of proving a compelling state interest in excluding persons from voting.

It is apparent from *McGowan v. State of Maryland*, 366 U.S. 420, that those who assail the classification must carry the burden that it does not rest on any reasonable basis, but that it is essentially arbitrary. Not only have the Petitioners failed in carrying out this burden, they have failed in their



inability to show that Act 138, *Acts of Alabama* (Appendix Pages A1, A2, & A3) is arbitrary, *McGowan v. State of Maryland, supra,* or that discrimination is shown or that they are based on irrational objectives, *Spahous v. Savannah Beach,* 207 *supra,* 688 (1962), or that they are wholly irrelevant means to achieve State objectives, *McGowan v. State of Maryland,* 366 U.S. 420.

Petitioners observe that the Supreme Court has repeatedly held that in elections of general interest, restrictions of the franchise other than residence, age and citizenship must promote a compelling state interest in order to survive constitutional attack. Respondents agree that such is a fair statement of the law as shown in *Hill v. Stone*, 421 U.S. 389 (1975), and other cases, but Respondents feel that Petitioners have overlooked the significant key to this line of cases. This line of cases is based on the "restriction of the franchise."

In the case of *Hill v. Stone,* 421 U.S. 389 (1975), residents of Fort Worth, Texas brought an action challenging provisions limiting the right to vote in city bond issue elections to persons who had "rendered" property for taxation. The Court held that such *restriction* of sufferage violated the Equal Protection Clause.

There is no restriction of the franchise in the case at hand since everyone is allowed to vote for Chairman of the County Board of Education and for the particular board member of the district in which the voter resides.

The decision below is supported by the case of *Clark v. Town of Greenburgh,* 436 F. 2d., 770 (2d Cir. 1971); *Glisson v. Savannah Beach,* 346 F. 2d. 135 (5th Cir. 1965) and *Rutledge v. Louisiana,* 330 F. Supp. 336 (1971) and the granting of summary judgment is supported by the various facts and authorities cited.

The non-city resident Petitioners further contend that even if revenue supports entitlement to city residents to the right to vote, that the same should not be applicable in the case before the court. Without delaying this response, it seems sufficient to point out that to be considered are the following: county student attendance to city schools, the vocational school located within the jurisdiction of the City of Jasper and the City Board of Education as well as the other reasons previously mentioned. The Court in *Clark v. Town of Greenburgh*, 436 F. 2d. 770, at 772:

> "it is not for the court to determine whether the quantum of services voters receive justifies the taxes they pay."

It appears from a comparison of *Clark* and the case at hand that the latter has a even stronger factual situation that demands the right to vote for the residents of the Cities of Carbon Hill and Jasper.



## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

This ..... day of December, 1976.

Respectfully submitted,

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**PROOF OF SERVICE**

I hereby certify that as a member of the bar of the Supreme Court of the United States, all parties required to be served have been served copies of the Brief in Response to Petition for Writ of Certiorari in compliance with the Rules of the Supreme Court of the United States, by depositing each in the United States mail, sufficient postage prepaid, addressed to the following:

1. Mr. Edward Still, 601 Title Building, Birmingham, Alabama 35203.

2. Mr. Laughlin McDonald, 52 Fairlie Street N.W., Atlanta, Georgia 30303.

3. Mr. Neil Bradley, 52 Fairlie Street N.W., Atlanta, Georgia 30303.

4. Mr. Melvin L. Wulf, 22 East 40th Street, New York, New York, 10016.

Done this ..... day of December, 1976.

PHILLIP A. LAIRD
*Counsel for Respondents*

# APPENDIX

# APPENDIX

Code of Alabama, Title 52, Section 63, 1971 Cum. Supp. To Vol. Twelve, Page 29.

§63. Members—The county board of education shall be composed of five members, who shall be elected by the qualified electors of the county. They shall be persons of good moral character, with at least a fair elementary education, of good standing in their respective communities, and known for their honesty, business ability, public spirit and interest in the good of public education. No member of the county board of education shall be an employee of said board; provided, that in counties having populations of not less than 96,000 nor more than 106,000 according to the most recent federal decennial census, not more than one classroom teacher employed by the board may serve as a board member and also as a teacher. (1927 School Code, §87; 1964, 1st Ex. Sess., p. 346, appvd. Sept. 4, 1964.)

*ACTS OF ALABAMA*, SPECIAL SESSION 1965, Vol. 1, Pg. 188, Act No. 138:

To provide further for the control, supervision and administration of public schools in Walker County; to fix the qualifications and to provide for the election of a chairman and associate members of the county board of education; to fix their terms of office; to provide for their compensation, and the manner of filling vacancies in office.
Be It Enacted by the Legislature of Alabama:

Section 1. The general supervision and control of the public schools of Walker County shall be vested in a county board of education, which shall consist of a chairman and four associate members.

Section 2. The chairman of the board shall be a resident and qualified voter of any district or beat in the county, a person of good moral character, of good standing

in his community, known for his honesty, business ability, public spirit and interest in the good of public education. He shall be nominated and elected by the qualified voters of the entire county; he shall take office on the day following his election and qualification and shall serve for a term of six years and until his successor is elected and qualified.

Section 3. One member of the board shall be a resident and qualified elector of each of the four districts from which members of the county governing body are elected. Each shall be a person of good moral character, of good standing in his community, known for his honesty, business ability, public spirit and interest in the good of public education. One member of the board shall be nominated and elected by qualified electors of district one; one member shall be nominated and elected by the qualified electors of district two; one member shall be nominated and elected by the qualified electors of district three; one member shall be nominated and elected by the qualified nominated and elected by the qualified electors of district four.

Section 4. The incumbent chairman and members of the board shall hold office until their respective terms expire. The successor members of the board to be elected from districts one and three shall be elected at the general election in 1930; the successor members of the board to be elected from districts two and four shall be elected at the general election in 1968; the successor chairman of the board shall be elected at the general election in 1966. The chairman and members shall take office immediately following their election and qualification and each shall serve for a term of six years and until his successor is elected and qualified. Vacancies in office of chairman or associate member of the county board of education shall be filled in the manner prescribed by general law.



Section 5. The members of the board shall be compensated at the rate of fifteen dollars ($15.00) per diem for attending meetings for the board but not to exceed two meetings in any one month. The chairman of the board shall be compensated at the rate of fifty dollars ($50.00) per month irrespective of the number of meetings attended.

Section 6. All laws or parts of laws which conflict with this Act are repealed.

Section 7. The provisions of this Act are severable. If any of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 8. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved March 29, 1965.
Time: 4:50 P.M.

*CONSTITUTION OF ALABAMA, CODE OF ALABAMA*, Vol. 1, Pg. 197, ARTICLE 5, Section 138:

Sec. 138. A sheriff shall be elected in each county by the qualified electors thereof, who shall hold office for a term of four years, unless sooner removed, and he shall be ineligible to such office as his own successor; provided, that the terms of all sheriffs expiring in the year nineteen hundred and four are hereby extended until the time of the expiration of the terms of the other executive officers of this state in the year nineteen hundred and seven, unless sooner removed. Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grievous bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached under section 174 of this Constitution. If the sheriff be impeached, and there-

upon conviction, he shall not be eligible to hold any office in this state during the time for which he had been elected or appointed to serve as sheriff.

*CONSTITUTION OF ALABAMA, CODE OF ALABAMA*, Vol. 1, Pg. 372, AMENDMENT 35.

XXXV

Sheriff Succeeding Self.

Section 128 of Article 5—A sheriff shall be elected in each county by the qualified electors thereof who shall hold office for a term of four years unless sooner removed, and he shall be eligible to such office as his own successor. Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grievous bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached, under section 174 of this Constitution. If the sheriff be impeached, and thereupon convicted, he shall not be eligible to hold any office in this state during the time for which he has been elected or appointed to serve as sheriff. (1936-37, Ex. Sess., p. 269.)